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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 864

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,

Petitioner,

vs.

LEONARD H. RUBIN, individually and as father and next friend of Deborah Rose Rubin, an infant, and as members of classes and the DADE COUNTY SCHOOL BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

Petitioner seeks a Writ of Certiorari to the Supreme Court of Florida, which on direct appeal affirmed a trial court ruling denying Petitioner's Motion to Quash a *Rule Nisi* for contempt for violation of a temporary injunction. The opinion below is reported at 238 So.2d 284 (Fla. 1970).

QUESTION PRESENTED

Respondent believes that the following question more adequately states the issue presented in the Petition:

> WHETHER PETITIONER MAY BE TRIED FOR CONTEMPT FOR VIOLATING A TEMPORARY INJUNCTION, WHERE PETITIONER WITH FULL KNOWLEDGE OF THE INJUNCTIVE ORDER AND AN OPPORTUNITY TO HAVE BEEN HEARD, REFUSED TO BE HEARD AND THEN VIOLATED THE SUBSEQUENT INJUNCTION WITH IMPUNITY AND WITHOUT ANY ATTEMPT TO JUDICIALLY CHALLENGE THE INJUNCTION UNTIL AFTER THE CONTEMPTUOUS ACTS OCCURRED.

STATEMENT

Petitioner, whose officers and members knowingly violated two injunctions for several days and then, after a contempt hearing was scheduled, for the first time sought judicial review of the injunctions, now for the third time seeks to relitigate its assertion as to the invalidity of the injunctions.

All of the Federal issues raised by Petitioner, as noted in Petitioner's Statement of the case, have already been considered and determined in its previous appeal reported at 217 So.2d 293 (Fla. 1968), from which appeal no Writ of Certiorari was sought. Subsequent to that decision, Petitioner filed an action in the United States

District Court, Southern District of Florida, seeking to enjoin contempt proceedings for the alleged violation. In a *per curiam* affirmance of the dismissal of Petitioner's action, the United States Court of Appeals for the Fifth Circuit stated:

> "The CTA sums up its position as follows: 'We contend that the state court injunction sought to be enforced is void *by reason of the method of its issuance*, and we have already conceded that if the injunction is not void, the decision below should be affirmed.' Since the Supreme Court of Florida has already passed upon this question it was not open to review by the United States District Court." (Citations omitted). *Dade County Classroom Teachers' Association, Inc., et al* v. *Nathan, et al*, 413 F.2d 1005, 1006 (C. A. 5).

The opinion below of the Supreme Court of Florida contains an accurate and complete statement of the relevant facts of the instant case, as well as the basis for the Court's decision. The Court held that the issue as stated by Petitioner as to the validity of the injunction had, under Florida Law and Federal Law, been determined against Petitioner on the previous appeal. Both the original injunction of February 22, issued with notice, and the subsequent injunction of February 23, which was conceded by Petitioner on appeal to be a re-issuance of the earlier injunction, were again held to be valid under Florida and Federal Law.

The following items omitted or not clearly stated in Petitioner's Statement of the case, and appearing in the opinion below, bear special emphasis:

1. Contrary to Petitioner's assertion that removal prior to the hearing of February 22, 1968, was properly effected under the provisions of 28 U.S.C. 1446, the Court specifically found that the Record did not contain the Petition for removal nor did it appear from the Record that Petitioner had properly effected the removal of the United States District Court as required by the aforesaid Statute.

2. Contrary to Petitioner's assertion that the Supreme Court of Florida "did *not* rule that this obedience to the injunctions prior to testing their validity was fatal", the Court specifically ruled that the Association, having failed to seek to challenge the validity of the injunction until the very day of the contempt hearing, had no standing to later claim that the injunction was invalid, no matter "how well founded their doubts might be as to its validity". *Dade County Classroom Teachers' Association* v. *Rubin*, 238 So.2d 284, 288 (Fla. 1970).

ARGUMENT

A. THE ISSUES INVOLVED HAVE BEEN PREVIOUSLY LITIGATED AND DETERMINED AGAINST PETITIONER.

Petitioner's Federal claims have already been heard and determined against Petitioner in the previous appeal. The Supreme Court of Florida specifically considered Petitioner's contentions that the injunction upon which the contempt proceeding was based was void both for lack of jurisdiction and for alleged constitutional infirmities, and ruled against Petitioner on the merits. *Ibid.* No Writ of

Certiorari was sought from that decision. Under the law of the State of Florida, this previous determination that the trial court had jurisdiction to enter the temporary injunction is "the law of the case", and a question so settled on earlier appeal may no longer be questioned on a subsequent appeal. *Rogers* v. *State*, 156 Fla. 161, 23 So.2d 154 (1945); *Ferguson* v. *Brogan*, 111 Fla. 224, 149 So. 772 (1933); *Sanders* v. *State*, 82 Fla. 498, 90 So. 455 (1921). Petitioner, by this Petition, is simply seeking to relitigate the finding of jurisdiction.

Moreover, the Record presented both then and now is totally inadequate to support Petitioner's contention that the temporary injunction was entered without jurisdiction. The Record does not contain the Petition for Removal filed with the United States District Court (which Petition was never filed with the Clerk of the Dade County Circuit Court as required by 28 U.S.C. §1446(e)) nor does the Record contain any evidence that the trial judge ever actually received a copy of the Petition as he clearly did in *Adair Pipeline Company* v. *Pipeliners' Local Union No. 798*, 203 F. Supp. 434 (D.C. Tex. 1962), *affirmed*, 325 F.2d 206 (C.A. 5). The Record does indicate that Petitioner was duly noticed and was represented at the hearing held on February 22, 1968, at which it had a full opportunity to be heard but chose not to do so. The Record further shows that although Petitioner received the subsequent injunction in the evening of February 23, 1968, which was substantially the same as and was a re-issuance of the previous injunction, it took no action to judicially challenge the Injunctive Order until February 27, 1968, after it had committed numerous violations during the intervening days, and its officers were scheduled for a contempt hearing.

On those facts the Supreme Court of Florida found as a matter of fact that Petitioner had received adequate notice, that it had had an opportunity to be heard, and that it had acted at its peril by intentionally violating the terms on the injunction rather than by raising any questions it may have had as to the injunction's validity through an orderly judicial process. The Court further found that on the facts presented, the Petitioner had failed to meet its burden in demonstrating that removal had been properly effected on February 22, 1968, or that the state court was without jurisdiction to enter a temporary injunction either on February 22, or February 23 of 1968, prior to the willful violations of the injunction which occurred on February 25, 26, 27 and 28 of 1968. *Hornung* v. *Master Tank & Welding Company*, 151 F.Supp. 169 (D.C.N.D. 1957); *Shenandoah Chamber of Progress* v. *Frank Associates*, 95 F. Supp. 719 (D.C. Pa. 1950); *Dolan* v. *F. H. McGraw & Co.*, 81 F.Supp. 599 (D.C.N.Y. 1958).

B. PREVIOUS FEDERAL AND FLORIDA LAW HAS BEEN CORRECTLY FOLLOWED; NO NEW OR SUBSTANTIAL ISSUES ARE PRESENTED.

The Supreme Court of Florida followed Florida Law which is identical to that noted by this Court to be the rule of law followed by the Federal Courts, *Walker* v. *City of Birmingham*, 388 U.S. 312, 314; *Howat* v. *State of Kansas*, 258 U.S. 181; *Brougham* v. *Oceanic Steam Navigation Co.*, 205 F. 857 (C.A. 2), to the effect that an injunction issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action and served upon persons made parties therein and within the jurisdiction must be obeyed even if based upon a void law

going to the merits of the case. The Orders of the Court are to be respected until a decision of the Court is reversed for error by orderly review. *Walker* v. *City of Birmingham*, 388 U.S. 307, 314. Moreover, "respect for the orderly process of law requires obedience to [an injunction] until a debatable issue of jurisdiction can be authoritatively decided." *In Re Green's Petition*, 369 U.S. 689, 696 (Harlan, J., concurring in part and dissenting in part); *United States* v. *United Mine Workers*, 330 U.S. 258, 309-310 (Frankfurter, J., concurring).

The Supreme Court of Florida relied upon and directly followed the Court's decision in *Walker* v. *City of Birmingham*, *supra*, and *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, and thus there is neither a new nor substantial question raised by the Petition.

In *Walker* v. *City of Birmingham*, *supra*, contempt convictions for violation of an *ex parte* injunction related to a mass protest were upheld because of the Petitioner's intentional disobedience of the Injunctive Order; "the Petitioners gave absolutely no explanation of why they did not make some application to the state court during that period", *Id.* 314 U.S. at 319; the Injunctive Order was issued by a court of general jurisdiction; and Petitioner had full knowledge of the *ex parte* Injunctive Order. All of this occurred in the instant case, except that in *Walker* the injunction was clearly *ex parte*.

Since the injunction sought to be quashed herein has been specifically held *not* to be *ex parte*, *Dade County Classroom Teachers' Association* v. *Rubin*, 217 So.2d 293 (Fla. 1968); *Dade County Classroom Teachers' Association* v. *Rubin*, 238 So.2d 284, 288 (Fla. 1970); *Dade County*

Classroom Teachers' Association, Inc., et al v. *Nathan, et al*, 413 F.2d 1005, 1006 (C.A. 5), this case presents even a stronger factual basis for affirmance and denial of certiorari.

Petitioner attempts to distinguish *Walker* on the asserted ground that Alabama Law was somehow different from existing Florida Law, yet Petitioner fails to cite a single Alabama case. Petitioner further asserts a distinction because "the injunction was transparently invalid or had only a frivolous pretence to validity", *Walker* v. *City of Birmingham*, 388 U.S. 315, and cites the Court's reliance in footnote six (6) of the *Walker* case to *In Re Green's Petition*, 369 U.S. 689, as authority for this distinction.

Petitioner's reliance both upon the footnote and *In Re Green's Petition*, is completely misplaced, for as the Court noted in the footnote:

> "The Petitioner in *Green*, unlike the Petitioners here, had attempted to challenge the validity of the injunction *before* violating it by promptly applying to the issuing court for an Order vacating the injunction." *Id.* at 315.

This is precisely what Petitioner failed and refused to do in the instant case which, as twice determined by the Supreme Court of Florida, involved not transparently invalid or frivolous injunctions, but valid injunctions issued by a court of competent jurisdiction. The holding of the Court below that Petitioner's "proper procedure was to seek judicial review of the injunction and not to disobey it, no matter how well founded their doubts might be as to its validity" correctly followed the holding of the Court

in *Walker* v. *City of Birmingham*, *supra*, and the earlier Florida decisions of *Seaboard Airline Railway Company* v. *Tampa Southern Railway Company*, 101 Fla. 468, 134 So. 529, *State ex rel Everett* v. *Petteway*, 131 Fla. 516, 179 So. 666, *State ex rel Buckner* v. *Culbreath*, 147 Fla. 560, 3 So.2d 380.

In *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, wherein the Court held an *ex parte* injunction invalid — not void — after finding that Petitioners therein, contrary to the acts of the Petitioner in the instant case, had specifically followed the course set forth in *Walker* v. *City of Birmingham*, *supra*, for an orderly judicial review, the Court stated:

> "The proper procedure, it was held [in *Walker*], was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity." *Id.* 393 U.S. 175, 179.

The Court in *Carroll*, in contrast to the instant case, further criticized the failure to "provide an *opportunity* for an adversary proceeding before the holding of the rally was restrained". *Id.*, 393 U.S. 175, 185. This factual distinction clearly supports the holding of the Supreme Court of Florida in which the Record indicates both an opportunity to be heard, which was not utilized, and an opportunity to challenge the injunction prior to the contemptuous acts, which again was not utilized. The Supreme Court of Florida further found, as a matter of fact, that the closing of the schools resulting from Petitioner's concerted mass actions presented an irreparable harm to the community, and that under Florida Law the injunctions were both valid and justified.

This factual finding relating to the fact that the injunctions were not directed to free speech, but rather to the irreparable harm caused by a mass closing of all of the Dade County public schools, further serves to distinguish this case from *Carroll* and from other cases involving injunctions as to free speech. Recognizing this distinction, the United States Court of Appeals for the Fifth Circuit in the collateral appeal by Petitioner stated:

> "In *Carroll* an injunction was issued ex parte enjoining a white supremacist organization from holding a rally for ten days. Here the Supreme Court of Florida has held that the February 23, 1968, injunction was not issued ex parte. In *Dombrowski* [v. *Pfister*, 380 U.S. 479] and *Zwickler* [v. *Koota*, 389 U.S. 241] the parties seeking an injunction were engaged in activities relating directly to free speech and the allegation was made that the prosecution was an unconstitutional scheme to impinge on their freedom of expression. We have nothing of the kind here." *Dade County Classroom Teachers' Association* v. *Nathan*, 413 F.2d 1005, 1006 (C.A. 5).

It, therefore, conclusively appears that the issues involved herein have already been determined adversely to Petitioner. *Walker* v. *City of Birmingham*, 388 U.S. 312; *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175; *In Re Green's Petition*, 369 U.S. 689. Since no new or important constitutional issues are presented, *United States* v. *Butler*, 297, U.S. 1, and the Court does not grant certiorari merely to review evidence and discuss specific facts, *United States* v. *Johnston*, 268 U.S. 220, 227, Petitioner has failed to present any basis that would warrant review by this Court.

CONCLUSION

The Petition does not present any questions warranting review by the Court, and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM S. FRATES, Assistant State Attorney, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this 15th day of December, 1970, mailed, First Class postage prepaid, three printed copies of the within Brief in Opposition to Petition for a Writ of Certiorari to these Counsel of record at their post office addresses:

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